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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 894

ROBERT HARTGRAVES,
Petitioner.

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

An accurate and satisfactory reference is contained on page 2 of the Petition herein. The same opinion is also reported at 202 N. E. 2d 33.

JURISDICTION.

An accurate and satisfactory reference is contained on page 2 of the Petition herein.

CONSTITUTIONAL PROVISIONS INVOLVED.

An accurate and satisfactory reference is contained on page 2 of the Petition herein. The pertinent text of the three provisions, excluded from the Petition, has been printed in this Brief and designated as "APPENDIX A".

QUESTIONS PRESENTED FOR REVIEW.

I. Whether a substantial and undecided federal question of the denial of assistance of counsel is presented by voluntary, self-incriminatory statements of a normally intelligent adult, commencing about two hours after arrest and accompanied by a reference to but no request for counsel.

II. Whether fact determinations that the aforesaid statements were not the product of actual or threatened physical coercion, or of a denial of requested telephone communications, or of a promise of leniency, require an independent examination.

PRELIMINARY STATEMENT.

References herein to "R." signify the certified record and transcript of proceedings in the trial court. References herein to "Abst." signify the certified Abstract of Record originally filed in the Supreme Court of Illinois, and appear when the relevant record fact has been abstracted.

STATEMENT OF THE CASE.

Omissions and distortions in the statement of the case recited at pages 4 through 16 of the Petition herein compel an entire restatement of the investigatory progress preceding, and the relevant circumstances of, the allegedly irresponsible crime detection of May 16 and 17, 1962.

On May 29, 1962 the presiding grand jurors of Cook County voted to indict both Clarence Joseph Kanovski and Robert Hartgraves for an arson of April 1, 1962 allegedly designed to defraud three insurers—the monetary, pre-trial bail of Hartgraves was 10% of that of Kanovski, who later received a severance for trial (Abst. 1; R. 3A-7A, 3). That indictment and the ultimate conviction of Hartgraves

were in part the product of his self-incriminatory statements on May 17, 1962.

Marjorie Helmer, a prosecution witness, had abandoned her husband and ten children to cohabit with Johnny Owens[1] in the second-floor apartment above a tavern in the relevant building before and until the 5:00 a.m. fire on April 1, 1962 (R. 324-325, 333-334). Warned by Owens of the imminent fire, Helmer at his request secured a $2000 insurance policy on her belongings (Abst. 50-51; R. 529-530). Around 3:00 a.m. on April 1 Hartgraves informed Helmer "... that if the building wasn't emptied out when he got there it was going to be cancelled to another date" (Abst. 50; R. 525). Two weeks later Hartgraves discussed the fire and informed Helmer that "... Joe was supposed to take care of it for him. . . . he was getting a loan and Joe was going to take over the payments and book" (Abst. 50; R. 526, 539). On May 4, both "scared" and subsidized by Kanovski, Helmer boarded a bus for Memphis and its Peabody Hotel, where she was joined on May 5 by Owens (Abst. 51; R. 531, 537, 540-541). Financially destitute a few days later, Helmer telephoned her mother in Chicago and "told her you were broke, wanted to come back?" (Abst. 51; R. 531). When the Memphis bus arrived at the Chicago terminal on May 8, Helmer was greeted by her mother, her husband, police officers John Weiss and George Wilkens (of the Chicago Police Department), and arson investigator Karl Scheel (of the Chicago Fire Department), to whom she

1. Johnny Owens was a fugitive witness during the hearing and trial, postponed until May of 1963. Helmer searched and found him in Memphis, Tennessee in January, 1963 but, instead of responding to the Chicago Police Department that Owens would not voluntarily return, joined him on a two-week vacation in Pensacola, Florida before bidding a permanent farewell on January 26. Subsequent moves to locate the probation violator did not succeed (Abst. 33, 41, 51; R. 321-322, 338-342, 436, 523, 545-547).

supplied her statement (R. 407-408, 477-478, 515, 543). Weiss had first spoken to Helmer's mother on April 26, 1962 (R. 385, 406). Helmer, ignorant of Owens' address in Memphis, later telephoned Owens to request his return, since "[t]hey would try to work something out" (R. 532, 542). Alone, Owens arrived in Chicago on May 16 and met Helmer around 3:00 p.m. at the police headquarters building, where he furnished his statement to Weiss, Wilkens and Scheel (Abst. 35; R. 322-323, 408-409, 478, 515).

A warrant for the arrest of Hartgraves was secured around 8:00 p.m. on May 16 (R. 158), and Helmer, Owens, Weiss, Wilkens and Scheel later proceeded in a four-door, Ford automobile to a tavern at the corner of St. Louis and Armitage Avenues. There, around 11:00 p.m., in order to avoid the risk "... that some member of his [Hartgraves'] family would have time to notify Mr. Joseph Kanovski that we were investigating the arson of 3356 West Grand Avenue" (Abst. 28; R. 248), Helmer obediently telephoned the Hartgraves residence less than a block away and, through a pre-arranged signal with Hartgraves himself, told his wife that she was Mrs. Kanovski and that her husband's automobile was near the specific tavern in need of repair by Hartgraves. Helmer then spoke to Hartgraves, and his arrest in front of the tavern immediately followed (Abst. 12, 26-27, 36, 46, 55-56; R. 101, 158-159, 164-165, 232, 246, 284-285, 315-316, 386, 468-469, 603-604, 674-675, 744-745).

Wilkens walked to the automobile parked by Hartgraves, identified himself as a police officer, and spoke of and exhibited the arrest warrant (R. 248, 250-251)—incidents which the petitioner conceded, but chronicled at shortly after 10:00 p.m. (Abst. 55-56; R. 10-11, 603-604). The material incidents intervening between the arrest and the initial admission of complicity by Hartgraves, relative

to actual and threatened *physical coercion*, are in dispute and require an inspection of testimony.[2]

HARTGRAVES. Wilkens threatened to strike him if he didn't exit his vehicle and, when he did, Scheel twisted his right arm and—*informed* about the prior injury—"... told me not to worry about my right arm, they would take care of that" (Abst. 3, 56; R. 10, 604). Weiss handcuffed him behind his back and Scheel (who was 6' 3" and 240 pounds: Abst. 31; R. 295) "... grabbed my pants, practically lifted me off the floor and shoved me into the squad car" (Abst. 3, 56, 58; R. 10-11, 604, 625-626). Because at the arrest scene the officers had "... bumped up against this scar, this cut I had on my left arm" (Abst. 4; R. 15), it began bleeding in the squad car, as Hartgraves told the police doctor later in the morning (Abst. 7; R. 33, 622); confronted at the *hearing* with a photographic demonstration that there was neither fresh nor dried blood on the wound earlier in the morning (Abst. 9; R. 64-67), Hartgraves testified at the *trial* that the "little trickle" had occurred "... when they pushed me into the squad car [because] my arm bumped up against the side of the car getting in" and was not disclosed at that time (R. 623-624). At police headquarters Wilkens "... said that if I didn't confess, they were going to throw me in a cell with a bunch of crazy dope addicts" (Abst. 4-5, 56; R. 15-16, 607) and Weiss "... told me that he could see that my wife and kid was taken care of, that my kid would go to a home, and my wife, he'd make it so miserable for her she couldn't find a job anywhere to support the kid" (Abst. 5, 56; R. 17, 606). Thirty minutes

2. It is not disputed that in 1959 two bones in Hartgraves' right shoulder had been separated and then joined by wires (Abst. 11; R. 145) and that around May 14, 1962, after an occupational injury that also was *not* "bothering [him] at the time of arrest" (Abst 3; R. 9) and had "healed" (R. 621-622), four stitches had been sewn by a company doctor over a cut in his left arm (Abst. 7; R. 30-31).

after arrival at headquarters, he read the statements of Owens and Helmer ". . . saying that I had started the fire and where I had started it and how much I had received for it" (Abst. 6-8, 59; R. 21, 39, 68-69, 637).

WEISS. The claims of mistreatment and threats were false (Abst. 12, 14-16, 63; R. 105, 113-115, 122-123, 126, 724-725) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (Abst. 38, 41; R. 180, 417, 437-438). Hartgraves was *not* handcuffed (Abst. 12; R. 104); he *was* handcuffed in front between the arrest scene and the Ford, where one cuff was switched from the left hand of Hartgraves to that of Weiss, who rode in the rear with Hartgraves, Helmer and Owens (Abst. 17; R. 160, 412, 417). During the interrogation between midnight and 1:15 a.m. Hartgraves rubbed his left arm, expressed the time of the injury as two weeks earlier and denied that it was hurting (Abst. 14, 41; R. 115, 434). It was not bleeding but ". . . looked like it was festering or something around the stitch ends" and at 9:30 a.m. a police doctor (Louis Rose, M.D.) was asked to examine the wound (Abst. 14, 19, 40-41; R. 116, 181, 425, 434). Confronted with the statements of Helmer and Owens, Hartgraves first called them liars, then (in the presence of Weiss *alone*) said Owens was present when he started the fire, and finally (when Owens entered the room) admitted that the Owens reference was a lie (Abst. 13, 18, 36-37; R. 108-109, 171-173, 389-394).

WILKENS. The claims of mistreatment and threats were false (Abst. 26-27, 63; R. 233-235, 238, 244-245, 728-731) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (Abst. 47; R. 265, 475-476). Wilkens handcuffed the right hand of Hartgraves and handed the other cuff to Weiss, to whom Hartgraves was cuffed and who rode in

the rear with Hartgraves, Helmer and Owens (Abst. 28; R. 249-252, 481-483). During the interrogation between midnight and 1:30 a.m. Weiss noticed the arm wound and informed the others, but Hartgraves ". . . said he got it at work, it was nothing, and it had been treated" (Abst. 29-30, 47; R. 259-261, 485). It was not bleeding but "looked infected" and at 10:00 a.m. was examined by a police doctor (Louis Rose, M.D.) (Abst. 26-27; R. 235, 238, 242, 260). Hartgraves was confronted with the statements of Helmer and Owens, and Weiss then asked the others to leave the room and alone heard the initial admission (Abst. 27-29, 46-47; R. 237, 256, 470, 486).

SCHEEL. The claims of mistreatment and threats were false (Abst. 31, 63; R. 276, 280, 719-721) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (R. 281, 294). The right hand of Hartgraves was handcuffed, and Wilkens held the handcuffs (R. 514-515). Scheel noticed the left arm wound after the arrival at police headquarters, but did not notice blood or "anything unusual about the wound" (Abst. 31; R. 293, 508). Scheel witnessed the medical examination later in the morning (Abst. 49; R. 280-281, 508).

HELMER. The claims of mistreatment and threats were false (Abst. 32, 50, 63; R. 317-321, 527, 741-744) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (R. 335). After the arrest by Wilkens, either Weiss or Wilkens escorted Hartgraves to the squad car and, an arm on his elbow, assisted his entrance; at an unknown moment before arrival at the police station, Hartgraves was handcuffed (Abst. 32-33; R. 316, 330, 538-539). Helmer first noticed the left arm wound in the vehicle; it was not bleeding but had healed (Abst. 33; R. 320, 335, 527).

FRANK GRADY. According to this fire insurance agent, whose part began in the arson office at police headquarters when Hartgraves and his captors arrived (Abst. 23, 25; R. 205, 220), the claims of mistreatment and threats were false (Abst. 23-24, 63; R. 207-208, 733-734) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (Abst. 25, 53; R. 215, 224, 572). Grady noticed the left arm wound shortly after Hartgraves' arrival at the arson office; neither blood nor other fluid was rising from the wound but, beneath the stitches, a swelling was apparent (Abst. 24-25, 53-54; R. 214-215, 223, 572-575). The police doctor's examination took place later in the morning (Abst. 54; R. 575). Hartgraves was confronted with the statements of Helmer and Owens and then admitted his complicity (Abst. 23; R. 207-208, 576).

DR. LOUIS ROSE. The police doctor examined Hartgraves about 10:00 a.m. in the arson office, and cleansed and dressed the healing wound which was not bleeding and which Hartgraves described as an occupational injury of May 11, which had been treated at a private clinic. There was no complaint about the right shoulder or police coercive practices (Abst. 21-22, 62; R. 149-154, 709).[3]

HERBERT SHERMER. This defense witness, a private physician who examined Hartgraves on May 18, 1962, furnished the key to the validity of the brutality claim. There were

3. Other witnesses to the several issues of coercion were police clerk Isabel Byrne (Abst. 30, 52, 62; R. 267-274, 558-564, 712-718), who recalled that ". . . Wilkens told him that they had called the doctor to look at the arm because they thought it may need attention and he declined attention but they insisted on the doctor seeing it anyhow" (R. 714); John Thornton, the municipal fire attorney (Abst. 22-23, 63; R. 200-205, 735-740); Jerome Miller, a stenographer (Abst. 31; R. 299-305); and Daniel McCarthy, a prosecutor (Abst. 32, 62; R. 305-314, 697-707).

no discernible symptoms of injury except the hearsay of the patient: he ". . . complained that he was extremely ticed the bone was sticking up again . . . . [o]n his right shoulder" (Abst. 11; R. 146). His expert testimony was thus in direct conflict with the views of Muriel Hartgraves, the petitioner's wife and a nurse, who on May 18 ". . . noticed the bone was sticking up again . . . [o]n his right shoulder, just above where the incision was made" (Abst. 10; R. 87).

About fifteen minutes after the private oral admission to Weiss alone (Abst. 36; R. 393-394), Hartgraves at 1:30 a.m. began to answer questions of Weiss in the presence of Wilkens, who accurately and simultaneously recorded the conversation by typewriter (Abst. 13-14, 27; R. 106-107, 113, 235-236, 264-265). The product, which was signed by Hartgraves and others around 3:30 a.m. (Abst. 14, 37; R. 118, 395-397), was introduced into evidence at the trial despite objection (Abst. 47; R. 490) and was read to the jury (Abst. 47-48; R. 490-497).

A warrant for the arrest of Clarence Joseph Kanovski had previously been secured (R. 119) and shortly after 4:00 p.m. Weiss, Wilkens, Scheel, Grady, Helmer, Owens and Hartgraves traveled in two vehicles to a gas station at Fullerton and Sawyer Avenues. Hartgraves had advised the police ". . . that Kanovski would not come out of his home for anybody, and he told us that he'd make a call" (R. 120). In response to that telephone call, Kanovski arrived at the gas station and was arrested (Abst. 15, 20, 27, 53; R. 119-122, 187-188, 239, 277, 318, 568). Wilkens then drove his two passengers, Grady and Hartgraves, to the latter's home at his request for a clean shirt and the opportunity to ask his wife to notify his employer about his expected absence. Grady entered the living room and listened as Hartgraves instructed his wife, in the adjoining bedroom, to notify the employer (Abst. 24-27, 53-

54; R. 210, 224-226, 240, 568-569, 577-578).[4] The group in each vehicle next traveled to the fire scene where, in the presence of other officials of the Chicago Fire Department, Hartgraves described the *modus operandi* of the arson (Abst. 15, 24, 27; R. 121-123, 212, 240-241, 278).

After the 10:00 a.m. treatment by Louis Rose, M. D. (Abst. 21; R. 149), Hartgraves at 11:20 a.m. began to answer questions of Daniel McCarthy, an Assistant State's Attorney of Cook County, in the presence of stenographer Jerome Miller, who accurately and simultaneously recorded the conversation by means of a stenotype machine (Abst. 31, 51; R. 300. 306-307, 550). The product, which Hartgraves refused to sign the following day (May 18) (Abst. 32; R. 309-310), was introduced into evidence at the trial despite objection (Abst. 52; R. 550-551) and was read to the jury (Abst. 52; R. 551-558).

On the morning of May 18 Hargraves appeared in court for a preliminary hearing and was released on bail (Abst. 7, 60; R. 25, 193, 677). A year and four days later, Hartgraves for the first time complained of his treatment in police custody between 10:00 a.m. of May 16 and 1:30 a.m. on May 17, alleging under oath that he ". . . was not allowed to contact friends or members of his family, despite . . . repeated requests . . . . [and that he] was without sleep, food, or water, and he was continuously struck, beaten and threatened . . ." by his captors (Abst. 1-2; R. 9A-10A).

4. Hartgraves testified at the hearing that he did not converse with his wife, and at the trial that he asked her to communicate with his employer (Abst. 8, 57; R. 56, 610).

REASONS FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI.

I.

Whether a Substantial and Undecided Federal Question of the Denial of Assistance of Counsel Is Presented by Voluntary, Self-Incriminatory Statements of a Normally Intelligent Adult, Commencing About Two Hours After Arrest and Accompanied by a Reference to But No Request for Counsel.

At the preliminary hearing to determine the voluntariness of his confessions, the extensive testimony of Robert Hartgraves was silent about his assistance of counsel on May 16 and 17, 1962 (Abst. 3-11; R. 8-85, 98-100). Police officer John Weiss then testified at the hearing that, in the course of the initial admission of guilt to Weiss alone around 1:15 a.m. on May 17 (Abst. 36; R. 393-394), Hartgraves "... asked, '*Do I need a lawyer?*' And [Weiss] said, '*Yes, you do*' (Abst. 20; R. 194) (Also see: Abst. 16; R. 126). According to Weiss, a request for a delay or for counsel or, until later (see Point II, *infra*), for the use of the telephone was not voiced (Abst. 17, 20; R. 170, 195).[5] Nor was Hartgraves the recipient of any further admonition. Since the principal suspect was Clarence Joseph Kanovski, and since the preceding and unconfirmed data had been furnished by two fugitives of doubtful credit (Marjorie Helmer and Johnny Owens), a realistic inference is that the questions of Weiss were primarily investigatory and not accusatory and that *his* purpose was not a confession

5. Hartgraves postponed any comment upon this exchange until trial, when he admitted the substance of the remarks and added that ". . . I asked him if I could make a phone call to call one and I didn't get no answer to either question" (Abst. 58; R. 615). After his wife's retention of an attorney, Hartgraves was released on bail on May 18 (Abst. 7, 59, 61; R. 25, 630-631, 683-684).

but a statement for prospective impeachment at a trial of Kanovski.

The present reliance upon conclusions that *Escobedo* v. *Illinois*, 378 U. S. 478, requires an affirmative instruction at least about the constitutional right of silence, *State* v. *Neely*, 395 P. 2d 557 (Ore.), and perhaps also about the right to counsel, *People* v. *Dorado*, 40 Cal. Rptr. 264, 394 P. 2d 952, is therefore misplaced. (Modified and unreported opinions after rehearings in *Dorado* and *Neely* were announced on January 29 and 27, 1965, respectively. Both California and Oregon, by 4-3 and 6-1 divisions, now demand evidence of warnings about silence *and* counsel.) An adult of normal intelligence, Hartgraves deliberately chose not to interrupt the interrogation by a demand to exercise his rights.[6] The Supreme Court of Illinois was justified in its essential conclusions that:

> ". . . there is no evidence that defendant requested the assistance of counsel. Under all the facts and circumstances of this case, we hold that the failure to warn the accused did not compel a rejection of the confession." *People* v. *Hartgraves*, 31 Ill. 2d 375, 380, 202 N. E. 2d 33, 35; see Petition, App. 5.

The author of that opinion, Mr. Justice Solfisburg, proceeded to dispute the validity of both *Neely* and *Dorado* and discovered no mandate in *Escobedo* that law enforcement personnel in every instance *must* ". . . affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt" (at 36). Although the record does not present this precise question, the sound reply is dictated and supported by ample reason and experience. And the view that a request

6. At this interrogation, as now, interference by peace officers with the right of a person in custody to communicate or consult with family or counsel was a criminal offense. Ill. Rev. Stat. 1963, ch. 38, par. 736b, 736c; also see par. 103-3, 103-4 and 103-8.

for counsel is a critical circumstance has been expressed, in a great variety of postures, by a large number of tribunals. E.g., *Browne* v. *State*, 131 N. W. 2d 169 (Wis.); *Commonwealth* v. *Patrick*, 206 A. 2d 295 (Pa.); *Green* v. *State*, 203 A. 2d 870 (Md.); *Hayden* v. *State*, 201 N. E. 2d 329 (Ind.); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. C. A.); *Mitchell* v. *Stephens*, 232 F. Supp. 497 (E. D. Ark.); *Morford* v. *State*, 395 P. 2d 861 (Nev.); *Pece* v. *Cox*, 396 P. 2d 422 (N. Mex.); *People* v. *Agar*, 253 N. Y. S. 2d 761 (Sup. Ct. Queens Co., N. Y.); *Ralph* v. *Pepersack*, 335 F. 2d 128 (C. A. 4); *State* v. *Fox*, 131 N. W. 2d 684 (Iowa); *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *State* v. *McLeod*, 1 Ohio St. 2d 60; 203 N. E. 2d 349 (Ohio); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669; *State* v. *Stinson*, 139 S. E. 2d 558 (N. C.); *State* v. *Wessett*, 205 A. 2d 510 (Sup. Ct. New Castle, Del.); *Turner* v. *State*, 384 S. W. 2d 879 (Tex.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7).

The crucial incident here is the reasonable conclusion of the courts of the State of Illinois that Hartgraves, an intelligent adult, retained control of the interrogation and was not ignorant of his right to counsel. This unanimous and justified result captures the middle path in the divided ruling of *Jackson* v. *United States*, 337 F. 2d 136 (D. C. C. A.), *supra*, wherein advice of the rights of silence and counsel had been communicated to the accused on the preceding day (at 138). The dissenter, Mr. Justice Fahy, could discover no waiver of counsel in the advice and absence of a request, but evidently would outlaw all secret interrogation beyond the presence of counsel (at 143-145). Concurring briefly, Mr. Justice Burger found no authority for rejecting ". . . all [voluntary] statements made by an uncounselled person in custody" (at 141), and evidently

would not require any affirmative caution. The *Jackson* opinion itself, delivered by Mr. Justice Danaher, essentially provided (at 140-141):

> "Obviously neither *Escobedo* nor *Massiah* can be read as barring use of this appellant's confession. Many, learned in the law, deeply believe that no accused should be convicted out of his own mouth. But the Supreme Court has never announced any such proposition—not even where the accused had no attorney and had received no Rule 5 "judicial caution." *United States* v. *Mitchell*, 322 U. S. 65, 70, 64 S. Ct. 896, 88 L. Ed. 1140 (1944). . . . If there were a rule that a confession may not be received *if made by an accused without counsel*, that would be the end of this case—and of scores like it.
>
> "We conclude that no rule of law required the exclusion of this appellant's confession, voluntarily made, after he had been warned by the F. B. I., the police and the United States Commissioner acting pursuant to Rule 40(b). He had not requested that counsel be appointed; he had retained no lawyer; that one was not then appointed for him denied him no right; and as the law now stands, there is no automatic rule of exclusion which will bar use of such a confession by an accused who has no lawyer, under circumstances such as appear on the record before us."

The actual interrogators in *Jackson* merely ". . . advised him that he did not have to speak to them" (at 138); the unproductive reference to *counsel* by Weiss was a no less satisfactory caution. The reasonable position of Mr. Justice Danaher, tempered with the recognition that fair criminal interrogation and voluntary disclosures are essential tools in the promotion and protection of a free society, deserves adherence and contradicts any claim that the questions answered by Robert Hartgraves present an undecided federal question of substance.

II.

Whether Fact Determinations That the Aforesaid Statements Were Not the Product of Actual or Threatened Physical Coercion, or of a Denial of Requested Telephone Communications, or of a Promise of Leniency, Require an Independent Examination.

Robert Hartgraves, by his two written admissions and by his testimony at the hearing and trial, described himself inescapably as a mature adult of at least average intelligence, who was not unaware of his rights on arrest. He was neither mentally subnormal nor youthful nor naive and impressionable. Nor was he the victim of extended or repeated interrogation, or deprivation of sleep or food, or the use of psychiatric techniques.[7] Nevertheless, he presents a series of circumstances to support a claim of coercion.

Communication. By testimony and argument the petitioner has attempted to establish that ". . . [c]onfronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family [he] understandably chose to make and

7. The petitioner's response to the claim of physical abuse is contained in the preceding "statement of the case." Relative to nourishment, Hartgraves at the hearing testified that between his arrest and completion of the second confession he had received neither food nor coffee and his requests for water had been scorned; at the trial he recalled a cup of coffee at the fire scene (Abst. 5, 7, 57; R. 18, 35, 49-50, 612). Contrarily, the prosecution witnesses testified that around 1:30 a.m. and again around 3:30 a.m. Hartgraves declined offers of food and drank coffee; and that around 6:00 a.m. at the fire scene he shared coffee and rolls before declining another offer of food at 8:30 a.m. (Abst. 14-15, 24, 30, 37; R. 117-118, 125, 211, 241, 265-266, 320, 397, 404, 571). The earlier written statement of Hartgraves, by establishing that he drank coffee and declined food around 1:30 a.m., contradicts his testimony (R. 496).

sign the damning written statement. . . ." *Haynes* v. *State of Washington*, 373 U. S. 503, 514. The Supreme Court of Illinois reacted with disbelief:

> "The testimony further refutes the claim that defendant was denied the right to make a phone call and the trial judge could clearly have found from the testimony of at least two witnesses that defendant was permitted to make a phone call to his wife upon his first request and that he called and talked to her and advised her not to worry." *People* v. *Hartgraves*, 31 Ill. 2d 375, 379, 202 N. E. 2d 33, 35; see Petition App. 4.

Hartgraves testified at the hearing that he had requested to use the telephone to call "my wife" (Abst. 5; R. 18) or "somebody to get a representative" (Abst. 6; R. 23), but that police officer John Weiss forbade telephone calls until he had been booked (Abst. 4-6; R. 14, 18-19, 23); at the trial Hartgraves described the intended receiver of the telephone call as an attorney (Abst. 58; R. 615). Weiss testified that, after the initial admission of guilt to Weiss alone around 1:15 a.m. (Abst. 36; R. 393-394), Hartgraves explained that his wife was pregnant[8] and upon his only request telephoned her (Abst. 13-14, 20-21; R. 106, 118-119, 195-196). The only other established witness to the telephone call, Marjorie Helmer, while seated outside the room containing Weiss and Hartgraves, overheard the request ". . . to call his wife because she was pregnant and he didn't want her to worry herself" (Abst. 33; R. 331); he then placed the call and ". . . told her that he was being questioned in regards to the fire and not to worry" (R. 337).

Promise. The question whether his captors had suggested or proposed leniency was absent from the particular-

8. Muriel Hartgraves testified that the second Hartgraves child was born in August, 1962, three months after the confessions in issue (R. 680).

ized and verified Petition to Suppress and from the extensive testimony of Hartgraves at the preliminary hearing (Abst. 1-11; R. 9A-10A, 8-85, 98-100). At the trial Hartgraves testified that ". . . Weiss told me if I went ahead with this statement that I would get probation, I could walk out of tnis courtroom a free man and wouldn't have to worry about anything" (Abst. 58; R. 615). At both the hearing and the trial Hartgraves explicitly traced his confessions to the alleged physical abuse and threats (Abst. 9-10, 57; R. 84, 607). The Supreme Court of Illinois concluded that the remarks of Weiss were a permissible and inconsequential opinion and exhortation toward truth:

> ". . . This question arose only after an extensive cross-examination of one of the police officers, in which he admitted that he told the defendant, 'It would go easier for him in court if he made a statement.' This is in no way the direct promise of leniency made in *People* v. *Heide*, 302 Ill. 624. Such a mere suggestion of the advisability of making a statement does not in itself render a confession involuntary. . . .
>
> "It is further significant that the defendant did not suggest that he was influenced by any promise of leniency until the statement of the police officer on cross-examination. . . ." *People* v. *Hartgraves*, 31 Ill. 2d 375, 381, 202 N. E. 2d 33, 36; see Petition, App. 6.

The only reliable measure of the present claim of an unfair inducement consists of the testimony of Weiss, as the testimony of Wilkens (Abst. 30; R. 261-262) and the absence of relevant testimony by other witnesses effectively narrowed the incident to a private conversation between Weiss and Hartgraves. Weiss testified essentially that he had not expressed "any promises or any inducement" (R. 437) but only an opinion of the possible consequences of an admission of guilt. At the hearing Weiss described that opinion (Abst. 18-19; R. 173-175):

"Q. Did you give him any reasons why he should make a statement?

A. No.

Q. Did you tell him it might be better for his soul if he made a statement?

A. Well, we explained to him what we had, and he made the statement.

Q. Did you tell him it would go easier on him if he made a statement?

A. It would be easier on him if he did make a statement if he was involved in it, yes.

Q. Did you tell him you might try to help him in court if he made a statement?

A. We do everything we can, because he said he had no record and never been arrested before.

Q. And you knew that was true, didn't you?

A. And he was willing to give us everything that he knew about the fire.

Q. You knew it was true that he had never been arrested before; you checked his record?

A. We checked the record, yes.

Q. You knew that he hadn't been arrested before.

A. That's right.

Q. And you told him it would go easier for him in court if he made a statement?

A. Well, we did, yes.

Q. Did you tell him that if he didn't make a statement he would be in jail for a while?

A. No, sir.

Q. Did you tell him what might happen to him if he didn't make a statement?

A. No, sir.

Q. He knew he was under arrest, didn't he?

A. Yes, he did.

Q. Did you tell him when he would be going to court?

A. I didn't tell him anything about going to court."

At the trial, again the victim of leading questions about an unspectacular remark more than a year earlier, Weiss repeated (Abst. 39; R. 423):

"Q. You told him it would go easier for him in court if he made a statement, didn't you?

A. Well, there wasn't any—

Q. The question is did you tell him it would go easier for him in court if he made a statement?

A. Yes, I did."

Moments later Weiss obtained his singular opportunity accurately to describe the opinion expressed (Abst. 41-42; R. 439):

"Q. You say you made no promises to him?

A. No, sir.

Q. But you did tell him it would go easier in court for him?

A. I did inform him if he told the truth in court it would go a lot easier.

Q. You told him if he would make a statement it would go a lot easier?

A. No, I didn't.

Q. Didn't you say that?

A. No."

His testimony at the hearing was then offered for impeachment (Abst. 42; R. 439-440).

The resultant issue is whether Robert Hartgraves, a twenty-five year old, employed father with nine years of formal education (Abst. 3; R. 8), became ". . . a person, accused or suspected of crime, to whom a policeman, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement." *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 343. The established policy of Illinois is that an expression like *easier* or *better* (*People* v. *Pugh*, 409 Ill. 584, 100 N. E. 2d 909; *People* v. *Ardelean*, 368 Ill. 274, 13 N. E. 2d 976) is, standing alone, a constitutionally permissible exhortation to tell the truth. Consult III Wigmore on Evidence, § 832 (3d. ed., 1940). That policy reflects no quarrel with the critical standard not of falsity but of voluntariness (see

Stevenson v. *Boles*, 221 F. Supp. 411 [N. D. W.Va.]), but does reflect a sensitive and realistic awareness that any confessor of normal intelligence anticipates, without *any* suggestion, an improvement of his position.

The decision here further represents a finding that, although the remark of Weiss may have shortly preceded or accompanied the initial confession, the alleged influence of the remark was disputed and disproven by Hartgraves himself. Where the record dispels a causal relation between the promise and the confession, a claim of coercion is not meritorious. *Ashdown* v. *Utah*, 357 U. S. 426. Before any self-incrimination the police had informed the accused that his relatives were being questioned, for the admitted purpose of arousing his sympathy, in the death case of *Hawkins* v. *United States*, 158 F. 2d 652 (D. C. C. A.). In testifying, the accused ignored the family references *until* the prosecution explored the subject, and he eventually exaggerated the references and claimed that his confession was their product. Speaking for an unanimous court, Mr. Justice Edgerton sustained the finding of a lack of influence (at 653-654):

> ". . . The policeman's admitted purpose in making his statement to Prout is evidence, but it is not conclusive evidence, that the statement conveyed an implied threat to hold Prout's relatives. Even if such a threat was conveyed, it did not make the subsequent confession 'involuntary' unless there was a causal connection between the threat and the confession. Causal connection between some kinds of pressure and subsequent confessions is obviously probable and should be assumed. But it is not obviously probable that a man who confesses a capital crime does so in order to expedite release of relatives who are not implicated or accused, even if he has been told that this result will follow. It is less probable in the case of these appellants, one of whom had gone through high school and the other through the ninth grade, than in

> the case of an illiterate defendant. It is the more improbable because of the variety of explanations of their confessions which the appellants offered. The policeman's statement to Prout, in view of its purpose, was highly improper, but mere impropriety which has nothing to do with the making of a confession does not preclude its use."

An identical principle should control the question of a promise to Robert Hartgraves, for ". . . it is significant that no testimony to this effect was presented at the hearing on the motion to suppress." *McHenry* v. *United States*, 308 F. 2d 700, 703-704 (C. A. 10). Instead, with reflection exceeding a year, Hartgraves linked his initial choice to confess with entirely unrelated causes (Abst. 9-10; R. 84):

> "Q. When you began not telling the truth, what was your physical condition?
>
> A. Well, my arm was hurting, and I was so nervous I didn't know what to do or say, and they kept threatening me, they were going to put my little girl in a home, and they were going to take care of my wife, they'd fix it up so I didn't have to worry about the pain in my arm any more. They just kept threatening me in and out. This tall one kept coming in and said, 'Let me throw him in a cell with a bunch of crazy dope addicts.'
>
> Q. Is that why you were saying things that weren't true?
>
> A. Yes."

The issues of actual and threatened brutality, of interference with requested communications, and of an influential promise of leniency are, in short, unsupported by the record.

CONCLUSION.

The respondent respectfully contends that the record circumstances and consequent issues do not present a unique and substantial federal question and that the Petition for a Writ of Certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

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